No. 9945

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

VIRGINIA DAVIS HARTMAN and MARGARET DAVIS RICHARDSON,

Appellants,

vs.

BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

I. STATEMENT OF CASE AND OF QUESTIONS INVOLVED.

The appellants' statement of the case is inadequate. It does not attempt to give in concise fashion a true picture of the case, nor does it state the questions involved. And so we must make our own statement.

The appellants, to whom we will refer in this brief as the plaintiffs, have appealed from an order dismissing their second amended complaint made upon the motion of Bank of America N. T. & S. A., one of the defendants, the appellee on this appeal.

The allegations of the complaint relate to three distinct matters: first, the allegations relating to the

fraud[1] which is the gravamen of the plaintiffs' cause of action; second, the allegations relating to the extrinsic fraud upon which they base their claim that the orders of the probate court should be vacated; and, third, the allegations with respect to their discovery of the fraud upon which they base their claim that their cause of action is not barred by the statute of limitations.

Although the complaint is long, covering forty-five pages of the record, it can be accurately summarized in a few pages.

1. The allegations relating to the fraud which is the gravamen of the complaint.

The complaint alleges that Samuel Platt and John S. Sinai, two of the defendants, were attorneys for Martina Maxine Dole, referred to in this brief as Mrs. Dole, at the time of her death on February 3, 1934, and for many years prior thereto (R. 7, par. XI); that in May, 1933, Mrs. Dole entered into an agreement with Sinai under which she advanced him $2500.00 so that he, as her agent and trustee, could purchase for her certain mining property; that Sinai purchased this property for $18,500.00 and paid on account of the purchase price $1850.00; that after Sinai acquired title to the property by paying the balance of the purchase price of $16,650.00, which had been advanced by one Morse, he, pursuant to an

[1]To be correct, we should insert the word "alleged" before the word "fraud" wherever the latter appears in this brief. But we have not done so, because we wanted to avoid this redundancy. This court will understand, of course, that whenever we refer to "fraud", we mean "alleged fraud".

agreement between himself, Platt and Morse, conveyed it to Sierra Consolidated Mines, Inc., hereafter referred to as Sierra Consolidated, another of the defendants, for shares of its stock which were then divided one-half to Morse and one-half to Sinai and Platt; that Platt, Morse and the Sierra Consolidated all had notice that Sinai had purchased the property as trustee for Mrs. Dole; that Sinai falsely represented to Mrs. Dole that he had been compelled to resell the property in order to obtain sufficient money to repay to her the $2500.00 advanced by her plus a small profit of $500.00; that the property so acquired by Sinai was reasonably worth the sum of $3,000,000.00; that since the transfer of the property to the Sierra Consolidated, Sinai and Platt have received from it $50,000.00 by way of dividends and attorneys' fees; and that Sinai and Platt hold this money and the Sierra Consolidated shares so received by them as trustee for Mrs. Dole (R. 7-20, pars. XI-XII).

The complaint also alleges that Mrs. Dole died intestate on February 3, 1934, leaving as her heirs the two plaintiffs, sisters, Harold F. Davis, a brother, one of the defendants, and Arthur A. Dole, the surviving husband, another of the defendants (R. 3, par. V); and that Davis and Dole are joined as defendants, because they would not consent to join as plaintiffs (R. 43, par. XXXV).

2. The allegations relating to extrinsic fraud.

The complaint alleges that on June 11th, 1934, the Superior Court of the State of California in and for the County of San Mateo appointed the Bank as

administrator of Mrs. Dole's estate (R. 3-4, par. VI);[2] that C. F. Humphrey and Luther Elkins, attorneys at law, who are joined as defendants, represented the Bank as such administrator (R. 6; par. X); that Dole, acting on behalf of himself and the plaintiffs, employed Humphrey and Elkins to represent the interests of the heirs of Mrs. Dole; that Humphrey and Elkins advised the Bank and Dole that the heirs of Mrs. Dole had a cause of action against Platt and Sinai arising out of the mining transaction (R. 22-24, par. XXIV); that thereafter the Bank made an agreement with Sinai under which it agreed that the estate's claim against Sinai for the alleged fraud should be compromised by the payment by Sinai of $5000.00; that the Bank informed Humphrey and Elkins, who opposed the compromise, that if they did not prepare a petition to the Superior Court for an order authorizing the Bank as administrator to make the compromise, the Bank would employ other attorneys to do so (R. 25-26, par. XXV); that the Superior Court on May 7, 1936, upon a petition prepared by Humphrey and Elkins, made such an order (R. 26-27, par. XXVI); that the Bank as administrator, in consideration of the payment to it by Sinai of $5000.00, then executed to him a release of all claims and Dole executed a similar release (R. 27-29, pars. XXVII-XXIX); and that on November 30,

[2]The complaint sometimes refers to the Bank as administrator and sometimes as special administrator. For example, the Bank is referred to in the former fashion on page 4 of the record, and in the latter on page 6. As the complaint indicates that the Bank was acting as administrator, not as special administrator, we have used the former term.

1936, the Superior Court made a decree distributing the estate and settling the account of the Bank, which decree ratified and approved the compromise (R. 4, par. VI; 29, par. XXIX; and 35, par. XXX(a)).

The complaint also alleges that Sinai was an officer and director of the First National Bank of Nevada, referred to herein as the First National; that Platt and Sinai were attorneys for it; that the First National was owned and operated by Transamerica Corporation, which also owned and operated the defendant Bank; and that by reason of these facts a fiduciary relationship existed between Platt and Sinai on one hand and the defendant Bank on the other, which relationship motivated the Bank in approving the compromise and petitioning the court for authority to make it (R. 32-34, par. XXXI(a)).

The complaint then alleges that shortly prior to the hearing of the petition for leave to compromise Humphrey and Elkins, upon being told by Dole that he was opposed to the compromise, replied that they agreed with him, but that it would be useless to oppose the Bank's petition; that in their opinion the compromise was illegal and would not be binding on the heirs; that Humphrey and Elkins then counseled Dole not to appear at the hearing and that they would represent the heirs; and that Dole for these reasons executed his release to Sinai (R. 35-37, par. XXXI(b)).

The complaint finally alleges that the order authorizing the compromise, the release executed by the Bank to Sinai, the release executed by Dole to Sinai,

and the decree settling the Bank's account and directing final distribution were procured by extrinsic fraud consisting in the following (R. 31-32, par. XXXI); that upon the hearings of the petition for leave to compromise and the petition for the settlement of the final account, Humphrey and Elkins and the Bank fraudulently represented to the Superior Court that the compromise was for the best interests of the estate (R. 39-40, par. XXXI(d)); that at said hearings the Bank and Sinai fraudulently concealed from the Superior Court facts material to the question whether or not the compromise should be effected and did not inform the court of the true nature and value of the estate's claim (R. 40-41, par. XXXI(d)); and that at the hearings Humphrey and Elkins and the Bank failed to call to the Superior Court's attention the true facts relating to the mining transaction, or the alleged relationship between Platt and Sinai on one hand and the Bank on the other, or the relationship between Humphrey and Elkins and the heirs, or the said reasons that actuated the Bank in making the compromise, or the fact that Humphreys and Elkins had advised Dole not to appear at the hearings and that they would represent him and the other heirs (R. 37-39, par. XXXI(c)).

The complaint then states that all the facts set forth in paragraph XXXII (that is the allegations respecting extrinsic fraud) "had a material bearing on the question and issue as to whether or no" the compro-

mise was for the best interests of the estate (R. 42, par. XXXIII).[3]

3. **Allegations relating to the statute of limitations.**

The complaint alleges that at all times mentioned in it, Mrs. Hartman, one of the plaintiffs, was a resident of New York and Mrs. Richardson, the other plaintiff, was a resident of New Jersey; that Mrs. Hartman did not discover the facts and circumstances with respect to the fraud which is the gravamen of the cause of action until April 21, 1938; that Mrs. Richardson did not discover them until July 31, 1938; and that the plaintiffs upon making such discovery "promptly caused said facts and circumstances to be investigated" and authorized this action to be commenced (R. 20-21, par. XXII).

The complaint also alleges that after Mrs. Dole's death, the plaintiffs authorized Dole to employ Humphrey and Elkins to represent all of the heirs, including the plaintiffs; that Dole did not advise the plaintiffs "specifically" with regard to the mining transaction and the claim of the estate in connection with this transaction; that none of the facts alleged in the complaint concerning the acts of the Bank and Sinai in procuring the order authorizing the com-

[3]The complaint does not contain any paragraph numbered XXXII, but paragraph XXXIII, page 43, follows immediately after paragraph XXXI, commencing on page 31. But paragraph XXXIII alleges that the facts alleged in paragraph XXXII have a material bearing on the question whether the compromise should have been made. As there is no paragraph XXXII in the complaint, the context clearly indicates that paragraph XXXI was meant.

promise and the decree settling the final account were known to the plaintiffs at the time of the filing of this action; that the plaintiffs were lead to investigate such facts and circumstances by reason of certain recitals contained in Sinai's answer to the plaintiff's original complaint; and that as a result of such investigation, the plaintiff discovered the facts relating to the extrinsic fraud about January 28, 1939 (R. 21-22, par. XXIII; 22-23, par. XXIV; 42-43, par. XXXIV).

4. Prayer of the complaint.

The complaint alleges that heirs of Mrs. Dole have been damaged in the sum of $3,000,000.00; and that the plaintiffs are entitled to one-third of this amount (R. 43, par. XXXVI).

The prayer is that a judgment in the sum of $3,000,000.00 be entered in favor of the heirs of Mrs. Dole "against said defendants"; that it be adjudged that the plaintiffs are entitled to one-third of this amount; that "said defendants" account to the plaintiffs and the other heirs for the property in their possession belonging to Mrs. Dole; and that the orders authorizing the compromise and decreeing distribution, the Bank's release to Sinai and Dole's release to Sinai be adjudged void, and for general relief (R. 44-45).

5. Statement of questions involved on appeal.

1. Does the complaint state a claim against the Bank upon which relief may be granted?

2. Are the orders of the Superior Court authorizing the compromise and settling the Bank's final account *res judicata* against the plaintiffs' claim against it?

3. Assuming that these orders are *res judicata,* does the complaint state an extrinsic fraud justifying setting aside these orders?

4. Does the complaint show on its face that the plaintiffs' cause of action is barred by limitations?

II. SUMMARY OF ARGUMENT.

1. There is no allegation or suggestion in the complaint that the Bank participated in the fraud constituting the gravamen of the cause of action, or that it derived therefrom any benefit of any sort. Therefore, even if it be assumed that the Bank participated in the so-called extrinsic fraud, the plaintiffs are not entitled to recover any damages from the Bank for the fraud which is the gravamen of the cause of action, or to a decree that it holds any property in trust for them. It follows that the complaint does not state any claim for relief against the Bank.

2. The well established principle is that a probate order, like a judgment in a civil action, is *res judicata,* not only with regard to the issues actually decided, but with regard to all matters relevant to such issues that could have been disputed on the hearing.

All the alleged facts constituting the so-called extrinsic fraud might have been disputed upon the hearings in which the probate orders were made; that is, for example, the plaintiffs could have contended upon these hearings that the Bank and Sinai were fraudulently representing to the court that the compromise was for the best interests of the estate and were concealing from it material facts relating to the mining transaction and the value of the property.

As these alleged facts could have been disputed on the hearings, the probate orders, under the principle just stated, are *res judicata* with respect to them.

3. The rule in California is that an extrinsic fraud cannot be a fraud material to the issues decided by the court making the judgment or order under attack, but must be collateral or extrinsic to such issues, and it must consist in some strategy or device which operates to prevent a party from presenting his case to the court.

The complaint does not state an extrinsic fraud under this rule: first, because the alleged facts which it claims constituted such a fraud were all relevant to the issues decided by the probate court in making the orders under attack; and second, because the complaint does not allege any acts which prevented the plaintiffs from presenting their case to the court.

4. The complaint shows that the fraud which is the gravamen of the cause of action is barred by limitations. The applicable statute provides that an action for fraud is barred three years after "dis-

covery". A little less than six years have gone by since the alleged commission of this fraud and the filing of the first amended complaint in this action, which was the first complaint to name the Bank as a defendant. The law is that where an action for fraud is commenced more than three years after it occurred, the plaintiff must allege in his complaint, not only when the fraud was discovered, but also what his discovery was, how it was made and why it was not made sooner, so that the court will be able to determine from the complaint that he used due diligence to detect it.

The complaint in this case is totally devoid of any such allegations. Furthermore, it contains allegations showing that Dole had knowledge of the fraud. As Dole was the plaintiffs' agent, his knowledge must be imputed to them. And finally it shows that the plaintiffs could have obtained knowledge of the fraud by the slightest sort of inquiry. "Means of knowledge are the same thing as knowledge itself."

It follows that the fraud which is the gravamen of the complaint is barred by limitations, and that therefore the plaintiffs' entire case must fall.

III. ARGUMENT.

A. THE COMPLAINT DOES NOT STATE A CLAIM AGAINST THE BANK UPON WHICH RELIEF MAY BE GRANTED.

As indicated by our statement of the case, there are two frauds involved in this action, the first being

the fraud constituting the gravamen of the cause of action, and the second being the extrinsic fraud.

According to the complaint, the fraud which is the gravamen of the cause of action consisted in Sinai's fraud in purchasing the mining property for Mrs. Dole as her agent and trustee, and then fraudulently retaining the property for himself and his associates and misrepresenting to Mrs. Dole that he had been compelled to resell it. If the plaintiffs as heirs of Mrs. Dole are to secure any relief in this action, such relief will be based upon this fraud. But the complaint does not allege, or even suggest, that the Bank participated in any way whatever in this fraud, or secured any benefit by reason of it. On the contrary, the complaint shows that the Bank took no part in this fraud and obtained no benefit from it.

It is, of course, true that any one who participated in a fraud is liable for damages even though he personally derived no benefit from it. But it is likewise true that one who does not participate in a fraud or who does not with knowledge derive any benefit from it cannot be held liable for it (12 Cal. Jur. 774-775, sec. 65).

As the complaint does not allege that the Bank participated in or derived any benefit from the fraud which is the gravamen of the cause of action, the Bank cannot be held liable in damages, nor can it be charged as trustee of property never received by it.

But the orders of the probate court bar the plaintiffs' claim to relief. And so they attempt to allege

in their complaint what they call an extrinsic fraud, and state that the Bank participated in it.

The complaint's allegations with respect to the Bank's reasons for participating in the extrinsic fraud cast considerable light upon the bona fide character of the plaintiffs' claims against the Bank. The complaint alleges that the Bank was a subsidiary of Transamerica; that Sinai and Platt were the attorneys for another subsidiary of the same holding company; and that these facts created a "confidential relationship" between the Bank and Sinai and Platt which induced the Bank to engage in the fraud upon the probate court (R. 32-34, par. XXXI(a)).

It is hard to conceive of a weaker motive for committing the fraud charged against the Bank. The Bank not only had no real motive for taking part in misleading the probate court, but it had every reason not to do so. In carrying on its trust business, it depends, not only upon the trust and confidence of the public, but also of the courts handling estates. It would most certainly seriously injure its reputation with the probate courts if it engaged in gratuitously deceiving them as alleged in this case. Furthermore, it had a very strong financial reason for prosecuting the claim against Sinai. If it could have recovered for the estate the mining property asserted by the plaintiffs to be worth $3,000,000.00, its commissions as administrator would have been very substantially increased. The Bank had every reason for not taking part in the extrinsic fraud; none for participating in it.

But if the plaintiffs could establish that the Bank took part in the extrinsic fraud and if we assume for argument's sake that this fraud would justify vacating the orders, still the plaintiffs could not base any claim for relief against the Bank on this ground. The only relief it could secure would be the setting aside of the orders of the probate court. It would then remain for the plaintiffs to establish the fraud which is the gravamen of their cause of action. But if we also assume for argument's sake that they will be able to establish this fraud, they will not be able to recover any damages against the Bank, or charge it as trustee with property never in its possession.

It follows that the complaint does not state any claim for relief against the Bank.

B. THE ORDERS AUTHORIZING THE COMPROMISE AND SETTLING THE BANK'S FINAL ACCOUNT ARE RES JUDICATA IN ITS FAVOR.

The plaintiffs argue their case as though they conceded that the orders were *res judicata* and that their only claim was that the complaint states an extrinsic fraud justifying setting aside the orders.

But at the same time, they claim that the orders were not conclusive with respect to matters raised in this action. For example, they maintain that they should be permitted to show in this action that the Bank and Sinai fraudulently misrepresented to the probate court that the compromise was for the best interests of the estate; and that the Bank and Sinai

concealed from the court material facts bearing on the question whether the compromise was in the estate's interest, including the value of the mining property and the alleged confidential relationship between the Bank and Sinai and between Humphrey and Elkins and the heirs. They say that they should be permitted to show these alleged facts as an extrinsic fraud.

Disregarding for the moment the point of extrinsic fraud, it is clear that all these matters bore upon the issue before the probate court, namely, whether the compromise was for the best interests of the estate; that the plaintiffs upon the hearings before the probate court could have shown them in support of their position that the compromise was not in the estate's interest; and that, therefore the orders of the probate court, under the well established principle, are *res judicata* in the Bank's favor with respect to all such matters.

The complaint alleges that Humphrey and Elkins, as attorneys for the Bank, prepared and filed in the Superior Court a petition for authority "to compromise the alleged indebtedness due from" Sinai "to the heirs" of Mrs. Dole for $5000.00, and that, thereafter, on or about May 25, 1935, the Superior Court made an order approving "the requested and suggested compromise" between Sinai and the Bank, as administrator, "concerning the aforesaid cause of action then existing in favor of the heirs" of Mrs. Dole against Sinai (R. 26-27, par. XXVI).

The complaint then goes on to allege that after the Superior Court made this order, the Bank, as admin-

istrator, in consideration of the payment to it by Sinai of $5000.00, executed to Sinai a release of all claims (R. 27-28, par. XXVII; 29, par. XXIX); and that on November 30, 1936, the Superior Court made an order distributing the estate and settling the account of the Bank as administrator, which decree ratified and approved the compromise (R. 4, par. VI; 29, par. XXIX; 35, par. XXXI(a)).

1. **The order distributing the estate and settling the account is res judicata.**

Sections 926 and 927 of the California Probate Code provide that when an administrator renders an account for settlement, the clerk shall set the same for hearing and give notice thereof; that any person interested in the estate may appear and file exceptions to the account and contest it; that "upon the hearing, the administrator may be examined on oath touching the account and the property and effects of the decedent and the disposition thereof"; and that all matters may be contested for cause shown.

And section 931 of this Code provides that the order settling the account is "conclusive against all persons interested in the estate", except that persons under legal disability may move to reopen the account at any time prior to final distribution. This saving clause has no application to this case.

It has been held in many cases that under these sections orders settling an account of an executor or administrator are *res judicata*. *Estate of Grant,* 131 Cal. 426, 428, 429, 63 P. 731, 732; *Estate of Mc-*

Dougald, 146 Cal. 191, 195, 79 P. 878, 879; *Estate of Rider,* 199 Cal. 742, 744, 251 P. 805, 806; *Ringwalt v. Bank of America,* 3 Cal. (2d) 680, 683-684, 45 P. (2d) 967, 969; and *Estate of Ware,* 20 A. C. 96, 99-100, 124 P. (2d) 12, 14.

Section 1021 of the Probate Code provides that an order of final distribution is conclusive. And it has been held that under this section such orders are *res judicata. Crew v. Pratt,* 119 Cal. 139, 149-150, 51 P. 38, 42, and *Manning v. Bank of California,* 216 Cal. 629, 634, 15 P. (2d) 746, 748-749.

The usual practice is to accompany an administrator's final account with a petition for final distribution and to combine in one decree the orders settling the account and directing distribution.

The complaint does not state explicitly whether this practice was followed in this case; but in view of its allegations we must infer that it was.

The first allegations of the complaint with regard to these proceedings are that "after due and proper proceedings had pursuant to statute * * * and on or about November 30th, 1936", the probate court made a decree of distribution (R. 4). Later the complaint alleges that the probate court entered a decree of "final distribution as hereinbefore more specifically alleged and referred to" ratifying and approving the compromise (R. 29). And then finally the complaint states that the probate court entered a decree of distribution "which contained an order approving and settling" the Bank's account as administrator and approving the compromise (R. 35).

In view of these allegations, it must be inferred that the account and the petition which accompanied it showed that Sinai pursuant to the order of compromise had paid the Bank $5000.00; and that the probate court upon the hearing then made the order ratifying and confirming it.

Even though the complaint did not contain the allegation just mentioned that the decree was entered "after due and proper proceedings", it would have to be presumed upon the appeal that the notice of the hearing of the account and petition for distribution was properly given. *Abels v. Frey,* 126 Cal. App. 48, 53-54, 14 P. (2d) 594, 596; *McLaughlin v. Security First National Bank,* 20 Cal. App. (2d) 602, 607, 67 P. (2d) 726, 728. The elementary rule, of course, is that a pleading must be taken most strongly against the pleader. 21 Cal. Jur. 51, sec. 29.

There can be no doubt that the decree is *res adjudicata* in the Bank's favor.

2. The order authorizing the compromise is res judicata.

It will be recalled that the complaint alleges that a petition for an order authorizing the compromise was filed and that the Superior Court then made such an order (R. 26-27).

The complaint does not indicate the provisions of the law under which this petition was filed and the order obtained. Section 578 of the Probate Code provides that the probate court may authorize a compromise when it appears to be just and for the best interests of the estate; that the administrator must

file a verified petition showing the advantage of the compromise; and that the clerk shall give notice thereof.

The California law is that an administrator in the exercise of his common law powers may compromise a claim of the estate without being obligated to petition under section 578 for leave to do so, in which case his right to make the compromise must be approved upon the settlement of his account; but that if he does petition for and secures an order authorizing a compromise, the same is conclusive and fully protects him. Sec. 1908 California Code of Civil Procedure; 11b Cal. Jur. 288, sec. 874; and *Moulton v. Holmes,* 57 Cal. 337.

There can likewise be no doubt that the order authorizing the compromise is *res judicata* in the Bank's favor.

We must next consider the matters with respect to which an order settling an account or authorizing a compromise are conclusive.

3. The orders were conclusive with respect to all matters that could have been disputed on the hearings.

The rule in civil actions is that when issues are presented for adjudication, the parties to the proceeding must bring forward all claims or defenses which are relevant to the issues, or which might properly have belonged to the subject of the litigation; and the judgment is *res judicata,* not only with respect to what was decided, but also with respect to any matter which might have been disputed at the hearing; any matter

that could have been litigated; any matter litigable, as well as litigated. The policy underlying this rule is that the law favors an end of litigation; and therefore when parties are given an opportunity to present their claims or defenses they must avail themselves of it, and if they do not do so they are bound by the judgment. *Woolverton v. Baker,* 98 Cal. 628, 631-632, 33 P. 731, 732; *Quirk v. Rooney,* 130 Cal. 505, 511, 62 P. 825, 827; *Price v. 6th District Agricultural Association,* 201 Cal. 502, 509-512, 258 P. 387, 390; *Caminetti v. Board of Trustees,* 1 Cal. (2d) 354, 356, 34 P. (2d) 1021, 1022; *Andrews v. Reidy,* 7 Cal. (2d) 366, 370-371, 60 P. (2d) 832, 834; *Sutphin v. Speik,* 15 Cal. (2d) 195, 201-203, 99 P. (2d) 652, 655-656, 101 P. (2d) 497.

To abridge this brief, we have not reviewed these cases here, but have reviewed certain of them in the appendix. We hope the court will not infer from this that we consider the cases unimportant. On the contrary, we believe that they have a vital bearing on the decision of this case.

The rule in civil actions applies in probate proceedings. A probate proceeding is a proceeding *in rem.* When the statutory notice is given, all persons interested in the estate are called before the court; each of them becomes an actor in the proceeding; and the order is binding upon all of them, whether or not he appears and presents his claims. *Kearney v. Kearney,* 72 Cal. 591, 594, 15 P. 769, 769-70; *Hanley v. Hanley,* 114 Cal. 690, 694, 46 P. 736, 737; *Mulcahey v. Dow,* 131 Cal. 73, 77, 63 P. 158, 160; and *Estate of Allen,* 176 Cal. 632, 633-634, 169 P. 364, 365.

The order of the probate court like a judgment in a civil action, is *res judicata* with regard to any matter relevant to the issues that "might have been disputed" at the hearing, that "could have been raised." *Estate of McDougald,* 146 Cal. 191, 195, 79 P. 878, 879; *Ringwalt v. Bank of America,* 3 Cal. (2d) 680, 683, 684, 45 P. (2d) 967, 968-69; *Carr v. Bank of America,* 11 Cal. (2d) 366, 371, 374-375, 79 P. (2d) 1096, 1099; *Estate of Keet,* 15 Cal. (2d) 328, 333-334, 100 P. (2d) 1045, 1048; *Estate of Gump,* 16 Cal. (2d) 535, 549, 107 P. (2d) 17, 24.

In the *Estate of McDougald,* supra, the court held that an order settling an administratrix' current account was conclusive against objections made on the settlement of her later final account that she in violation of a statute had purchased a claim against the estate pending its administration. The court said (146 Cal. 195, 79 P. 879):

> "A judgment or order of a court having jurisdiction is conclusive of all matters involved *which might have been disputed at the hearing,* although no objection was in fact made. This rule applies to the settling of accounts the same as to any other proceeding. (Estate of Grant, 131 Cal. 426; Estate of Bell, 142 Cal. 102.)"[4]

In the *Estate of Keet,* supra, a trustee filed a petition for an order authorizing it to sell shares held by it in a trust created by a decree of distribution for the benefit of the decedent's widow. There was grave doubt whether under the decree the trustee had

[4]All emphasis by italics are ours unless otherwise indicated.

a power of sale. The petition for leave to sell did not allege that there was any doubt with regard to the trustee's power of sale, nor did it allege the existence of any emergency justifying a deviation from the provisions of the trust. The probate court made an order authorizing the trustee to sell the shares and reinvest the proceeds. The trustee then filed an account. The widow filed objections to it upon the ground that the trustee had no power of sale and that therefore it was responsible for the loss arising out of the sale of the shares. The probate court surcharged the trustee's account upon the ground that the petition for leave to sell did not present the issue of the trustee's power and that therefore the order authorizing the sale was not *res judicata*. The Supreme Court held that the widow upon the hearing of the petition could have presented her contention that the trustee did not have any power to sell, and that therefore the order authorizing the sale was *res judicata*. It said (15 Cal. (2d) 328, 333-334, 100 P. (2d) 1045, 1048):

> "The petition for instructions and authority to sell was a distinct and independent proceeding, and the order of the court was appealable. (Prob. Code, sec. 1240.) No appeal was taken, and consequently it became a final determination of the matters adjudged, with the force and effect of a final judgment. (See Security etc. Bank v. Superior Court, 1 Cal. (2d) 749 (37 Pac. (2d) 69; Estate of Davis, 151 Cal. 318 (86 Pac. 183, 9 Pac. 711, 121 Am. St. Rep. 105); Baldwin v. Stewart, 218 Cal. 364 (23 Pac. (2d) 283).) * * *
>
> The fact that the petition did not specifically request a construction of the decree of distribu-

> tion, but simply alleged that petitioner had concluded that it was for the best interests of the estate to sell and diversify investments, is not controlling. Since the trustee's powers were derived from the decree of distribution, the meaning and effect of its provisions were necessarily in issue in the proceeding. The scope of a judgment, when collaterally attacked, is not limited to the factual or legal points expressly urged by counsel or considered by the court; *it extends to matters which could have been raised and considered in the particular proceedings under the particular pleadings.*"

There is no need to review the other authorities. There can be no doubt that the rule is that in a probate proceeding, as well as in a civil action, it is incumbent on the parties to present all the claims and demands which are relevant to the issues, or that properly belong to the subject of the litigation, and that the judgment or order is *res judicata,* not only with respect to the matter actually decided, but also with regard to all other matters that could have been litigated.

The application of this rule to the case at bar is obvious. The issue upon the hearing of the petition for leave to compromise, and the issue upon the hearing of the Bank's petition to settle its final account and for final distribution was the same, namely, whether the compromise was for the best interests of the estate. The allegations of the complaint which it calls the extrinsic fraud were all relevant to this issue. For example, the allegations that the Bank and Sinai fraudulently misrepresented to and concealed from the

court facts bearing on the advisability of the compromise, and that the Bank and Sinai concealed from the court the alleged confidential relationship between them, all bore upon this issue. The complaint itself admits that this was so. Paragraph XXXIII of the complaint (R. 42) states that the allegations of extrinsic fraud in paragraph XXXI (incorrectly referred to as paragraph XXXII) had a "material bearing on the question and issue as to whether or no the compromise was for the best interests" of the estate.

As these allegations were relevant to the issue raised on these hearings, they could and should have been raised and considered at that time.

It follows that under the principle established by the authorities cited the orders are *res judicata* in the Bank's favor against all the matters the plaintiffs seek to show in support of their claim that the orders should be set aside.

But let us now consider the plaintiffs' position from another point of view, that is their claim that the allegations of the complaint state an extrinsic fraud.

C. THE COMPLAINT DOES NOT STATE AN EXTRINSIC FRAUD JUSTIFYING VACATING THE ORDERS.

It is, of course, true that the decision of this point, and the other points involved on this appeal, is controlled by the rules established by the state courts. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64, 58 S. Ct. 817.

The law of California with respect to extrinsic fraud is well established.

The rule is that a court will not set aside a judgment or decree upon the ground that it was procured by perjury, misrepresentation or the concealment of pertinent facts; but it will only set aside a decree upon the ground that it was procured by extrinsic fraud.

An extrinsic fraud is one which does not go to the merits of the proceedings in which the judgment or decree under attack was made, but is extrinsic or collateral to that proceeding; and it consists in some fraudulent artifice or scheme, the effect of which is to prevent a party from presenting his case to the court. *Pico v. Cohn,* 91 Cal. 129, 25 P. 970, 27 P. 537; *Ringwalt v. Bank of America,* supra; *Carr v. Bank of America,* supra; and *McLaughlin v. Security National Bank,* supra.

But as we pointed out in our discussion of the preceding point, the allegations of the complaint constituting what it calls an extrinsic fraud are nothing more than allegations of fact relevant to the issue passed on by the probate court, namely, the issue whether the compromise was for the best interests of the estate. These statements are not allegations of some fraudulent artifice or scheme, the effect of which was to prevent the plaintiffs from presenting their case to the probate court. They are, therefore, allegations of an intrinsic, not an extrinsic fraud, and so do not justify setting aside the orders.

Let us now review the cases laying down the pertinent rules, and then let us apply them more in detail to the allegations of the complaint.

1. **The authorities relating to extrinsic fraud.**

Pico v. Cohn, supra, is a leading case in this state. The complaint in this action alleged that in a previous action between the same parties the defendant had secured a judgment by bribing a witness to commit perjury. The prayer was that the previous judgment be vacated. The court, in affirming a judgment dismissing the complaint after an order sustaining a demurrer, said (91 Cal. 129, 133-34, 25 P. 970, 971, 27 P. 537):

> "That a former judgment or decree may be set aside, and annulled for some frauds there can be no question; *but it must be a fraud extrinsic or collateral to the questions examined and determined in the action.* And we think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by forged documents or perjured testimony. The reason of this rule is, that there must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy. What, then, is an extrinsic or collateral fraud, within the meaning of this rule? Among the instances given in the books are such as these: Keeping the unsuccessful party away from the court by a false promise of a compromise, or pur-

posely keeping him in ignorance of the suit; or where an attorney fraudulently pretends to represent a party, and connives at his defeat, or, being regularly employed, corruptly sells out his client's interest. (United States v. Throckmorton, 98 U. S. 65, 66 and authorities cited.)

In all such instances the unsuccessful party is really prevented, by the fraudulent contrivance of his adversary, from having a trial; but when he has a trial, he must be prepared to meet and expose perjury then and there."

The plaintiffs are laboring under the misconception that there is a distinction between a positive perjury and a fraudulent concealment of facts relating to the issue before the court. Such concealment is not an extrinsic fraud any more than positive perjury is extrinsic. Neither is "collateral" to the question to be decided. Both have a bearing on the issue and are intrinsic.

The plaintiffs apparently also believe that the fact that a fiduciary relationship existed between the Bank as administrator and the heirs would justify this court in setting aside the orders. If this were the rule, a probate order would have no stability whatever. When an administrator commences any proceeding in the probate court, as for example a proceeding to secure an order confirming a sale, or to authorize a compromise, or to settle an account, he is instituting a proceeding in rem. All persons interested in the estate became actors in the proceeding, and are required to present whatever claims they may have with regard to it; and the order made in it is conclusive against

them, whether or not they appear and present their claims. In such a proceeding, the administrator is not the fiduciary of the heirs; he is their adversary. When he files his account, for example, he in effect notifies the heirs that if they have any objection, they must make it, and that if they do not do so, they will be bound by the order of settlement. The situation is the same as though a trustee of a voluntary trust had brought suit in equity against his beneficiaries to settle his account.

The fact that there is a confidential relationship between the administrator and the heirs does not mean that the orders obtained in the course of the administration of the estate have not the effect of *res judicata,* or that they can be set aside except upon the same ground that any judgment or order may be set aside. This is demonstrated by many cases, a few of which we will now review.

In *Ringwalt v. Bank of America,* supra, the complaint alleged that the Bank as executor and then as trustee had been guilty of fraud and neglect in holding shares of the Bank and Bancitaly Corporation and later shares of Transamerica for which the other shares were exchanged; that the probate court had made orders settling the Bank's final account as executor, and its current accounts as trustee; that the accounts filed by it did not show the appraised value of the shares or their depreciation; and that the Bank had not given any special notice of the hearings of its accounts to the plaintiffs, or caused a guardian *ad litem* to be appointed for the minor plaintiffs. The

fact that a fiduciary relationship existed between the Bank and the claimants against it made no difference in the case. The court, in affirming an order sustaining the demurrer to the complaint held, first, that the orders settling the Bank's accounts were *res judicata* in the Bank's favor against the claims of fraud and negligence; and, second, that the complaint failed to state an extrinsic fraud justifying setting aside these orders. It is the latter point in which we are interested at this point. The court said with regard to it (3 Cal. (2d) 680, 683-684; 45 P. (2d) 967, 968-69):

> "We are therefore brought to the point where it is necessary to determine whether the cause of action attempted to be stated alleges facts constituting extrinsic fraud authorizing the court to set aside the decree and compel the executor to make restitution. Extrinsic fraud has been many times defined and quite recently in the case of Caldwell v. Taylor, 218 Cal. 471 (23 Pac. (2d) 758, 88 A. L. R. 1194), we had occasion to refer to the definition contained in the leading case of United States v. Throckmorton, 98 U. S. 61 (25 L. Ed. 93), to the effect that it consists of some 'fraud practiced directly upon the party seeking relief against the judgment or decree' by which '*that party has been prevented from presenting all his case to the court.*' And we also set forth a succinct statement from Clavey v. Loney, 80 Cal. App. 20 (251 Pac. 232), as follows: 'The extrinsic fraud which alone will warrant a court of equity in setting aside a judgment or decree consists of such fraud *as prevents a real trial of the issues involved in the case,* like conduct which prevents the injured party from receiving notice of the ac-

tion or which causes the absence of necessary witnesses.' "

Carr v. Bank of America, supra, presented substantially the same claim as the *Ringwalt* case. The decedent's will named the Bank as both executor and trustee, and the plaintiff claimed that the Bank as executor had fraudulently and negligently held shares of Transamerica. There was, however, this important difference between the cases. The *Ringwalt* case was decided upon demurrer to the plaintiffs' complaint. The *Carr* case was decided after trial. At the trial it appeared that the widow and two minor children of the deceased, one of whom was the plaintiff, had executed an agreement suggested by the trust officer of the Bank, and drafted by its attorney, providing that the shares should be distributed to the Bank as trustee in lieu of cash bequests given it under the will. The contention was that the Bank had secured this agreement in order to prevent the heirs from presenting their claims of negligence and fraud upon the hearing of the Bank's final account and petition for distribution, and that therefore the Bank's act in securing the agreement and in concealing from the beneficiary and the probate court the alleged fraud and negligence amounted to an extrinsic fraud.

The court held that these facts did not constitute an extrinsic fraud; and also that if there was any fraud in the procurement of the agreement, it was within the issues presented to the probate court upon the application for distribution in accordance with the

agreement and was therefore intrinsic. The court said (11 Cal. (2d), 366, 372-73, 374, 79 P. (2d), 1096, 1110-1101):

"The trial court found that the bank did not exercise any dominion or control over the parties interested to procure the execution of the agreement, and this finding finds support in the record. The extrinsic fraud relied upon by the appellant in this regard is therefore necessarily limited to the procurement by the respondent bank of the execution of the agreement by the minor beneficiary and *the nondisclosure and concealment* from him of the possibility that the executor's account might be surcharged upon a claim of negligence and fraud in the administration of the estate by the bank, together with the presentation of such agreement to the probate court *with no disclosure to the court* of the bank's interest adverse to the sale of the shares of Transamerica stock during the administration of the estate * * *.

"Moreover, the agreement itself was presented to the probate court for its approval and for its incorporation into the decree of distribution, and this fact compels the conclusion that *any fraud in its procurement, now alleged, was necessarily within the issues of its fairness and the advisability of the approval of such agreement by the probate court,* and, even if fraud were proven, it would constitute intrinsic, in contradistinction to extrinsic, fraud. In Caldwell v. Taylor, 218 Cal. 471 (23 Pac. (2d) 758, 88 A. L. R. 1194), we held: 'It also seems to be the rule that the fraud alleged must not be the fraud which is in effect the issue in controversy, the fraud upon which the cause of action in the former suit was based.' In the in-

> stant case, not only was the issue of whether the bank fraudulently retained the shares during administration presented to the probate court upon the executor's account, *but also the question of whether it fraudulently secured the agreement upon the petition for final distribution.* It follows that the order settling the bank's account as executor and for final distribution was conclusive with regard to its acts as executor."

The application of this to the case at bar is, of course, obvious. The agreement of compromise was presented to the probate court on two occasions, first, when it made the order authorizing the compromise, and next, when it made the order settling the account. If there was any concealment of any material facts relating to the issues whether the compromise was for the best interests of the estate, or whether there had been any fraud in the procurement of the agreement, such concealment was an intrinsic, not an extrinsic, fraud. And these questions were necessarily within the issue of the "fairness and the advisability of the approval" of the compromise presented upon both hearings; and therefore the alleged fraud was intrinsic.

In *McLaughlin v. Security National Bank,* supra, the complaint alleged that the defendant as trustee of a testamentary trust had negligently invested funds of the trust in mortgage participating certificates inadequately secured and void because issued without a permit of the Corporation Commissioner. In affirming an order sustaining a demurrer to the complaint, the

court held that the orders settling the Bank's accounts as trustee were conclusive and that the complaint did not state an extrinsic fraud justifying vacating these orders. At said (20 Cal. App. (2d) 602, 605, 606, 67 Pac. (2d) 726, 727-28):

> "'Extrinsic fraud' is best defined both negatively and affirmatively. Negatively, it may be said not to be fraud which goes to the merits of the judgment. Affirmatively, it is fraud which has prevented the cause from having been fully considered on its merits. * * *
>
> Tested by this definition, as we find it applied, the complaint does not allege facts showing extrinsic fraud. In part the allegations show fraud which is intrinsic: it went to the merits of the reports. In this respect we note that each report, other than the first, contains this statement: 'The details of all its acts and of these transactions and the securities and or properties in which the trust estate is now invested are as set forth herein. All investments made for said trust are in securities authorized by law or by the terms of said trust, have been carefully selected and made for the purpose of serving the best interests of this trust and all parties interested therein, and on none of them has the trustee made any profit, direct or indirect.' This statement was false, the complaint avers, and was known to the trustee to be so, and it was made to bring about the result achieved, the confirmation of the report. To the same end, the complaint points out, the report was silent about the lack of a permit to issue certificates of participating interests, and made no mention of the character or value of the property standing as security back of the certificates. * * *

> In approving the acts of the trustee in making the investments it had reported, the probate court necessarily had open before it the question of the legality of the investments and the matter of their economic merit as well. The approval of these investments, requested by the trustee, presented for determination at least these two issues. *The false representations and lack of complete revealment on these issues,* therefore, went to the merits of the cause submitted for judgment; they constituted intrinsic, not extrinsic fraud."

There is no need to consider any other cases. No principle of law is better established in this state than that a judgment or decree will not be set aside upon the ground of intrinsic fraud, such as perjury, misrepresentation or concealment of pertinent facts; but that a judgment or decree can only be set aside upon the ground of an extrinsic fraud, that is a fraud not going to the merits of the proceeding in which the order or decree was made, and consisting in some fraudulent scheme, the effect of which is to prevent a party from presenting his case to the court.

Nor is there any need to extend this brief by a detailed consideration of the cases cited by the plaintiffs in support of their claim that their complaint states an extrinsic fraud. There is nothing in these cases that qualifies or impairs the principle established by the recent cases.

2. The application of the extrinsic fraud rule to the complaint.

1. The complaint alleges that upon the hearing of both the petition for leave to compromise and the peti-

tion for the settlement of the final account, Humphrey and Elkins and the Bank fraudulently represented to the Superior Court that the compromise was for the best interests of the estate (R. 39-40, par. XXXI(d)). There is no need for us to argue the proposition that such alleged fraudulent representations would constitute an intrinsic fraud.

2. The complaint also alleges that at these hearings the Bank and Sinai fraudulently concealed from the court facts material to the question whether or not the compromise should be effected and did not inform the court of the true nature and value of the estate's claim (R. 40-41, par. XXXI(d)). The cases we have reviewed demonstrate that concealment of material facts is just as much an intrinsic fraud as misrepresenting such facts. The issue before the probate court on both hearings was whether the compromise was for the best interests of the estate. If it was induced to make its orders by the fraudulent concealment of facts, such fraud was intrinsic.

3. The complaint alleges that at the hearings Humphrey and Elkins and the Bank did not call to the court's attention the alleged confidential relationship between Platt and Sinai on one hand and the Bank on the other, or the fact that the Bank in misleading the probate court was actuated by this alleged relationship between it and Platt and Sinai (R. 38, par. XXXI(c)).

The fact is that the complaint does not allege the existence of a confidential relationship of any sort be-

tween the Bank and Sinai and Platt, and that if it had, the failure of the Bank to disclose it upon the hearings would at most have constituted an intrinsic fraud. The complaint alleges that Sinai was an officer and director of the First National Bank of Nevada; and that Platt and Sinai were attorneys for it; that the First National was owned and operated by Transamerica, which also owned and operated the defendant Bank, and that by reason of these facts, a fiduciary relationship existed between Platt and Sinai on one hand and the defendant Bank on the other, which relationship motivated the Bank in approving the compromise and petitioning the court for authority to make it (R. 32-34, par. XXXI(a)).

These allegations do not show a confidential relationship between the Bank and Platt and Sinai. If the Bank had employed Platt and Sinai, then there would have been the confidential relationship of attorney and client between them. But if one subsidiary of a holding company employs an attorney, it does not mean that all the subsidiaries of the same holding company have employed him. The relationship of attorney and client cannot be created without a contract of employment; the complaint is devoid of any allegation that the Bank employed Sinai and Platt as its attorneys.

But even though a confidential relationship had existed between the Bank and Sinai and Platt and the existence of this relationship had induced the Bank to mislead the probate court, and even though the Bank had concealed the existence of this relationship

and the reasons for its fraud from that court, these facts would not have constituted an extrinsic fraud. They would have been relevant to the issue before that court, and would not have prevented the plaintiffs from presenting their case to it, and so would not have constituted an extrinsic fraud.

While discussing this point, let us say again that when the plaintiffs state that the Bank was motivated to participate in the alleged deception of the probate court because of the so-called confidential relationship between itself and Sinai and Platt, they show how weak their case against the Bank really is. As we have said, the complaint shows that there was no relationship of any sort between the Bank and Sinai. Even though the facts alleged did create some sort of tenuous relationship, the Bank had every reason, both financial and moral, not to participate in misleading the probate court.

4. The complaint states that Humphrey and Elkins and the Bank did not explain to the probate court at the hearings that Humphrey and Elkins had been employed to represent the heirs upon the administration of the estate (R. 38, par. XXXI(e)). There was nothing improper on the part of Humphrey and Elkins in representing both the administrator and the heirs. 11b Cal. Jur. 492-493 says:

> "And the fact that attorneys for a representative are acting as attorneys for an heir seeking to determine his rights does not of itself incapacitate the representative or indicate that he is unfaithful. In a controversy between heirs upon a matter

> in which the representative has no interest and which does not affect his relation to the estate, the attorney for the latter violates no obligation to his client by acting for one of the heirs. Correlatively and for the same reason the representative violates no obligation to his trust by continuing to retain such attorney."

This fact, therefore, does not tend to show an extrinsic fraud. If the plaintiffs are to base their claim that they have alleged an extrinsic fraud upon the relationship between Humphrey and Elkins and themselves, they should have alleged much more than that these attorneys represented both the Bank as administrator and the heirs; they should also have alleged that these attorneys conspired with the Bank to fraudulently sell out their interests. As we are about to show, they have not done this. Furthermore, the complaint shows that Dole acting for himself and as agent of the plaintiffs employed Humphrey and Elkins, and that he knew that they were representing the Bank as administrator (R. 22-25, par. XXIV). Dole's knowledge must be imputed to the plaintiffs for whom he was acting.

5. The complaint alleges that Humphrey and Elkins were the attorneys for the Bank (R. 6, par. X); that Dole, acting on behalf of himself and the plaintiffs, employed Humphrey and Elkins to represent them in the administration of the estate; that at that time he, on behalf of himself and the plaintiffs, entered into a written contract with these attorneys under which he agreed to pay them one-half of all

moneys recovered from Platt and Sinai; that Humphrey and Elkins advised both Dole and the Bank that in their opinion Mrs. Dole's heirs had a cause of action against Sinai and Platt (R. 22-24, par. XXIV); and that shortly prior to the hearing of the petition for leave to compromise Humphrey and Elkins, upon being told by Dole that he was opposed to the compromise replied that they agreed with him, but that it would be useless for him or any one else to oppose the petition as the probate court "would not listen seriously to any of the heirs" who might oppose it, but would grant it irrespective of any such opposition; that Humphreys and Elkins then advised Dole that in their opinion the compromise was illegal and would not be binding on the heirs; that they counselled him not to appear at the hearing "as he would accomplish nothing by so doing" and that they would represent the heirs; that thereafter Humphrey and Elkins furnished Dole "a written opinion to the effect that said compromise was not binding on the heirs * * * as far as the defendant, Samuel Platt, was concerned"; and that Dole relied upon these statements of Humphrey and Elkins, and as a result thereof did not appear at either of the hearings (R. 35-36, par. XXXI(b)).

In a subsequent paragraph the complaint alleges that upon the hearing of both petitions, Humphrey and Elkins and the Bank fraudulently represented to the probate court that the compromise was for the best interests of the estate (R. 39-40, par. XXXI(d)), and that Humphrey and Elkins and the Bank failed

to call to the court's attention material facts relating to the mining transaction, and the alleged relationship between the Bank and Sinai and Platt, and the relationship between Humphrey and Elkins and the heirs (R. 37-39, par. XXXI(c)). The complaint also states that under the decree settling the Bank's account and directing final distribution there was paid Humphrey and Elkins under their said contract of employment $2500.00, one-half of the amount paid by Sinai (R. 29-30, par. XXIX).

These allegations do not constitute an extrinsic fraud. The complaint does not allege or suggest that the Bank instructed or requested Humphrey and Elkins to advise Dole not to appear at the hearing, nor that there was anything in the nature of a conspiracy between the Bank and Humphreys and Elkins to induce Dole not to appear at the hearing. And there is no suggestion in the complaint that Humphrey and Elkins were acting fraudulently in giving this advice to Dole. On the contrary, this paragraph of the complaint (par. XXXI(b)) states in effect that these lawyers in giving this advice to Dole were acting in good faith. It alleges that Humphrey and Elkins agreed with Dole's statement that the compromise was not for the best interests of the estate. This certainly does not indicate any intention to mislead him. The paragraph also alleges that Humphrey and Elkins advised Dole that the compromise was illegal and would not be binding on the heirs, and that they then gave him a written opinion to the effect that the compromise was not binding on the

heirs so far as the defendant, Platt, was concerned. There is no suggestion of fraud in this. On the contrary, it suggests that Humphrey and Elkins on one hand and Dole on the other were seeking to play a smart game in the transaction; that they were seeking to obtain from Sinai his $5000.00, believing that the heirs were not bound by the settlement and that they would be able to proceed against Platt. They were hoist on their own petard. At least so far as the Bank is concerned, their smart trick has not worked. But the essential point is that the complaint does not suggest that Humphrey and Elkins in giving this written opinion to Dole were acting in collusion with the Bank for the purpose of preventing Dole from presenting his case upon the hearings.

This paragraph of the complaint (par. XXXI(b)) also alleges that Humphrey and Elkins advised Dole not to appear at the hearing and that he relying on their advice did not appear. The same thing is true of these allegations as of the other allegations of this paragraph, that is, that the complaint does not allege that Humphrey and Elkins in giving this advice were doing so in collusion with the Bank for the purpose of preventing Dole from appearing at the hearing and presenting his case to the court. On the contrary, these allegations, when taken into consideration with the other allegations of this paragraph, suggest that Humphrey and Elkins gave this advice as part of the smart trick being concocted by them and Dole to secure Sinai's $5000.00 and then proceed against Platt.

It is true that paragraph XXXI(d) (R. 39-41) alleges that Humphrey and Dole and the Bank fraudulently represented to the court that the compromise was for the best interests of the estate and neglected to call to the probate court's attention material facts relating to the claim and the relationship of the parties. But as we have pointed out, these allegations are allegations of an intrinsic fraud. They relate to matters relevant to the issues before the probate court, and could not have operated to prevent the plaintiffs from presenting their case to that court.

The complaint does not allege why Humphrey and Elkins joined with the Bank in making these alleged misrepresentations to the court, but we can infer from the allegations of paragraph XXXI(b) that Humphrey and Elkins did this in order to carry out the scheme between them and Dole to secure Sinai's money and then to hold Platt.

Whatever the reason for this alleged conduct on the part of Humphrey and Elkins, the fact is that the complaint contains no allegation that they and the Bank conspired to prevent the plaintiffs from trying their claim in the probate court.

If the plaintiffs had intended to charge these lawyers with corruptly selling out their clients, a most contemptible form of fraud, they should have said so in their complaint clearly and unequivocally. They have not done this. A pleading must be construed most strongly against the pleader, and a party cannot ask a court to infer a fact from his pleading,

particularly fraud, but must allege it positively and directly.

The complaint under consideration is a second amended complaint. We are certainly entitled to presume that if the plaintiffs had felt that they could possibly prove such a conspiracy between the Bank and these lawyers, they would have so alleged in their third complaint. The fact that they did not do so is conclusive.

6. This completes our analysis of the allegations of the complaint.

It is clear that the complaint's allegations relate to matters that were material to the issue before the probate court, and could not have prevented the plaintiffs from presenting their case to that court. It follows that the complaint does not state an extrinsic fraud, and that the trial court's order dismissing it must be affirmed.

D. THE COMPLAINT SHOWS ON ITS FACE THAT THE PLAINTIFFS' CAUSE OF ACTION IS BARRED BY LIMITATIONS.

The plaintiffs state that the Bank did not make this point with any energy in the trial court, and they suggest that the Bank will not urge the point seriously on this appeal (Plts. B. 5). The contrary is the case. The Bank relied strongly on the point in the trial court, and urges the point on this appeal as a very good reason why the order of the trial court should be affirmed.

The applicable statute of limitations is subdivision 4 of section 338 of the California Code of Civil Procedure, providing that an action for fraud is barred in three years, but that the cause of action in such case is not deemed "to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud".

The record on this appeal contains only the second amended complaint which was filed on November 16, 1940. But the attorneys for the parties have stipulated that the clerk of the District Court shall certify and transmit to this court copies of the original complaint and the first amended complaint. In view of the contention under discussion we know this court will want this done in order to have the facts.

The original complaint shows that it was filed in the state court on September 12, 1939; but it also shows that it did not name the Bank as a defendant; that it stated that the decree settling the final account had been duly made; that it did not mention the order authorizing the compromise; and that it contained no allegations upon which a claim was based that these orders should be set aside.

The first amended complaint was filed in the District Court on February 20, 1939. It named the Bank as a defendant and mentioned the orders and attempted to state grounds for setting them aside.

It will be recalled that the mining transaction between Sinai and Mrs. Dole giving rise to the claim asserted in this case took place in May of 1933, and

that Mrs. Dole died in February, 1934. It thus appears that more than five years went by from the time the fraud which constituted the gravamen of the cause of action took place until the filing of the original complaint, and that a little less than six years transpired between the commission of this fraud and the filing of the first amended complaint naming the Bank as a defendant.

When a plaintiff brings an action for fraud more than three years after the fraud occurred, the rules of pleading are well established. The plaintiff must allege, not only when he discovered the alleged fraud, but also what it was, how it was made and why it was not made sooner, so that the court will be able to determine from his complaint that he used due diligence to detect it. The circumstances of the discovery must be fully stated, because if there has been any lack of diligence in making discovery, the action is barred. And the complaint must also show that the fraud was committed under circumstances that the plaintiff would not be presumed to have any knowledge of it, "as that it was done in secret or was kept concealed." And "means of knowledge are the same thing as knowledge itself." The law is stated in *Consolidated R. & P. Co. v. Scarborough,* 216 Cal. 698, 701-703, 16 P. (2d) 268, 269-270, as follows:

> "The rules of pleading governing the statement of a cause of action for fraud committed more than three years prior to the commencement of suit are now well settled. They are admirably stated in the leading case of Lady Washington

C. Co. v. Wood, 113 Cal. 482, 486 (45 Pac. 809), from which we quote:

'The right of a plaintiff to invoke the aid of a court of equity for relief against fraud, after the expiration of three years from the time when the fraud was committed is an exception to the general statute on that subject, and cannot be asserted unless the plaintiff brings himself within the terms of the exception. * * * "Discovery" and "knowledge" are not convertible terms, and whether there has been a "discovery" of the facts "constituting the fraud" within the meaning of the statute of limitations, is a question of law to be determined by the court from the facts pleaded. As in the case of any other legal conclusion, it is not sufficient to make a mere averment thereof, but the facts from which the conclusion follows must themselves be pleaded. * * * *He must show that the acts of fraud were committed under such circumstances that he would not be presumed to have any knowledge of them—as that they were done in secret or were kept concealed.'* * *

"The following appears in Wood v. Carpenter, 101 U. S. 135, 140 (25 L. Ed. 807): 'In this class of cases the plaintiff is held to stringent rules of pleading and evidence, "and especially must there be distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation were discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made." * * * A general allegation of ignorance at one time and of knowledge at another (is) of no effect. If the plaintiff made any

> particular discovery, it should be stated *when it was made, what it was, how it was made, and why it was not made sooner.* * * * A party seeking to avoid the bar of the statute on account of fraud must aver and show that *he used due diligence to detect it, and if he had the means of discovery in his power, he will be held to have known it.* * * * *There must be reasonable diligence: and the means of knowledge are the same thing in effect as knowledge itself. The circumstances of the discovery must be fully stated and proved* (court's italics), and the delay which has occurred must be shown to be consistent with the requisite diligence.' ''

Under the rule of the *Scarborough* case the fraud which constitutes the gravamen of the cause of action is barred by limitations.

The complaint alleges that at all times mentioned in it, Mrs. Hartman, one of the plaintiffs, was a resident of New York and that Mrs. Richardson, the other plaintiff was a resident of New Jersey; that Mrs. Hartman did not discover the facts constituting the fraud which is the gravamen of the cause of action until April 21, 1938, and that Mrs. Richardson did not discover them until July 31, 1938; and that the plaintiffs upon making such discovery promptly caused the facts and circumstances to be investigated and authorized this action to be commenced (R. 20-21, par. XXII).

It is perfectly obvious that these allegations do not meet the requirements of the rule. They state when

the alleged discovery was made; but the complaint is totally devoid of allegations as to what the discovery was, how it was made and why it was not made sooner; and there is nothing in the complaint showing that the plaintiffs used diligence to detect the fraud, or that the delay was consistent with the diligence the law demands.

The complaint is not only defective because it fails to show these essential facts, but it is also defective because it shows positively that knowledge of the fraud should be imputed to the plaintiff.

The complaint alleges that Dole immediately after Mrs. Dole's death on February 3, 1934, advised the plaintiffs that there were certain matters that "would require attention and likewise the services of an attorney * * * to represent" the heirs, and that he "was about to procure the services" of Humphrey and Elkins "to represent him as an heir at law" of Mrs. Dole, "and suggested that he * * * would be very glad to protect the interests of the plaintiffs and to have" Humphrey and Elkins "act as attorneys for all the heirs, including the plaintiffs, * * *; that said suggestion met with the approval of the plaintiffs and said approval was communicated by them to Dole * * *" (R. 21-22, par. XXIII). It thus appears that Dole told the plaintiffs two things: first, that there were certain matters in the estate that would require attention; and, second, that the services of an attorney would be necessary; and then he suggested two things, first, that "he (that is Dole) would be glad to

protect their interests''; and, second, that he would employ attorneys to represent them all. The plaintiffs agreed.

The complaint also shows that Dole, shortly after the death of Mrs. Dole in February of 1934, had full knowledge of the facts constituting the fraud which is the gravamen of the cause of action (R. 22-25, par. XXIV); but it alleges that Dole did not advise the plaintiffs ''specifically'' with regard such facts (R. 22, par. XXIII).

When the plaintiffs appointed Dole their agent to protect their interests in the estate, Dole had both the right and the duty to examine all matters relating to the estate bearing upon the rights of the plaintiffs and to report to them facts which they should know to safeguard their interests. Under elementary principles, his knowledge as the agent of the plaintiffs must be imputed to them.

Furthermore, the plaintiffs had readily available full knowledge of both the frauds. Although the complaint alleges that Dole did not specifically advise them with regard to the fraud which is the gravamen of the cause of action, still he was their agent and the slightest inquiry by them of him would have disclosed the facts. ''Means of knowledge are the same as knowledge.''

There can be no doubt that the fraud which is the gravamen of the cause of action is barred by limitations.

It will be recalled that the order authorizing the compromise was made on May 7, 1936, and the decree of final distribution and settlement of the account was made on November 30, 1936. As stated, the amended complaint, which for the first time named the Bank as a defendant was filed on February 20, 1939. It thus appears that the facts constituting the extrinsic fraud occurred within three years of the date on which the first amended complaint was filed.

But the fraud constituting the gravamen of the cause of action is the heart of the plaintiffs' case; if they cannot recover for this fraud, it would avail them nothing to set aside the probate orders; and as this fraud is barred by limitations, their entire case must fall.

IV. CONCLUSION.

The complaint shows that the Bank did not participate in the fraud which is the gravamen of the cause of action; and received no benefit from it; and so the complaint does not state any ground for relief against the Bank.

The facts constituting the so-called extrinsic fraud were material to the issues before the probate court and therefore the orders of that court were *res judicata* with respect to them.

These facts do not constitute an extrinsic fraud, because they were within the issue decided by the

probate court and did not operate to prevent the plaintiffs from presenting their case to that court.

Furthermore, the complaint shows that the fraud constituting the gravamen of the cause of action is barred by limitations and therefore plaintiffs' entire case is destroyed.

There can be no doubt that the order of the trial court dismissing the complaint should be affirmed.

Dated, San Francisco,
July 20, 1942.

Respectfully submitted,
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(Appendix Follows.)

Appendix.

Appendix

REVIEW OF CASES RELATING TO THE DOCTRINE OF RES JUDICATA.

Let us begin a review of these cases with the leading case in California on the subject.

In *Woolverton v. Baker,* 98 Cal. 628, 33 P. 731, the plaintiff in her first action alleged in her complaint that she had conveyed certain land to the defendant in trust for her to pay her the income during her life. In her second action, the plaintiff alleged in her complaint that she had conveyed the land to the defendant in consideration that he would apply sufficient of the rents to support her during her life. The plaintiff's first claim was a claim that the defendant held title in trust; her second claim was that he had agreed to apply the rents to her support. The court held that the plaintiff's second claim was relevant to the issue raised by her complaint in the first action; that it could have been litigated in the first action; and that therefore the judgment in that action was *res judicata* against her. The court said (98 Cal. 628, 631-632, 33 P. 731, 732-733):

> "A party cannot litigate his cause of action by piecemeal, and, after a judgment against him seek in another action to obtain relief dependent upon the transaction therein adjudged, *by bringing forward claims and demands properly belonging to the first action. The judgment against him is conclusive, not only of what was in fact determined, but also of all matters which might have been presented in support of his cause of action and litigated therein.* The rule is stated by Vice-Chan-

> cellor Wigram in Henderson v. Henderson, 3 Hare, 115: 'Where a given matter becomes the subject of litigation in and of adjudication by a court of competent jurisdiction, *the court requires the parties to that litigation to bring forward their whole case,* and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of matter *which might have been brought forward as a part of the subject in contest,* but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, *but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.*' "

We will not consider the intervening cases, but will next review the case of *Price v. Sixth District Agricultural Association,* 201 Cal. 502, 258 Pac. 387, which is a very recent case, but has been cited often since its decision and is an important decision on this subject in this state. The first action was a proceeding in mandamus instituted by the City and County of Los Angeles against the Chairman of the Board of Supervisors of the County and the Mayor of the City to compel them to execute an agreement, dated June 21, 1920, to which the City and County were parties, under which a stadium was to be erected. Judgment was entered in the mandamus proceeding that the agreement was valid and that the officials of the City

and County should execute it. Thereafter, another agreement was executed, dated November 15, 1921, making certain unimportant changes in the original agreement. The second action in this case was an action by the plaintiffs as citizens and taxpayers of Los Angeles to enjoin the erection of the stadium under the second agreement. The court held that the plaintiffs in the second action were represented by the officials of the City in the first action and were therefore in effect parties to the first action; that all of the contentions of the plaintiffs in the second action were relevant to the issues in the first action and could have been litigated in that action; and that therefore the judgment in the first action was *res judicata* against the plaintiffs. The court said (201 Cal. 502, 509-512, 258 P. 387, 390-391):

> "This rule is similarly stated in 34 Corpus Juris, section 1162, page 750, where it is said: 'A judgment rendered by a court of competent jurisdiction on the merits is a bar to any future suit between the same parties or their privies, upon the same cause of action, in the same or another court, so long as it remains unreversed and not in any way vacated or annulled.' * * *
>
> "In sections 1908 and 1909 of the Code of Civil Procedure this rule has likewise been announced. * * * Appellants, admitting the general rule, however, seek to avoid the effect thereof by asserting that the causes of action are not the same; that the contract of June 21, 1920, made the subject of judgment by the district court of appeal on February 23, 1921, is not the basis of the cause of action here involved predicated upon the contract of November 15, 1921. But it is undisputed

that the latter contract is but a recast of the former and that the subject matter covered by the two contracts is the same. The issue tendered to both agreements is as to the power of the city or county to contract in the same way representing identical subject matter. In that sense the causes of action are identical. * * * We have no hesitancy, therefore, in concluding that the causes of action are substantially the same and that the rule of law above announced is applicable, provided always that the parties are identical.

"Moreover, it is immaterial under the peculiar facts of this case whether the causes of action be the same or not. Appellants in this connection cite Freeman on Judgments, fifth edition, pages 1416, 1417, as follows: '* * * a former adjudication may be used for two different purposes, namely, either as a complete bar to the relitigation of the same cause of action, or as conclusive evidence of some fact or issue common to different causes of action.' (See, also, Horton v. Goodenough, 184 Cal. 451, 461 (194 Pac. 34).) But the fact is that the issue determined by the former suit is the only issue presented by the present suit. * * *

"Appellants, however, apparently have a misconception of this rule. They seem to contend that an issue heard and determined in a former case is binding only as to such grounds supporting or opposing said issue as were actually urged and litigated. But an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result. In other words, when an issue has been litigated all inquiry respecting the same

is foreclosed, *not only as to matters heard, but also as to matters that could have been heard in support of or in opposition thereto.* This rule has been aptly stated as follows: 'It is important to note in this connection, however, that even though the causes of action be different, if the second action involves a right, title or issue as to which the judgment in the first action is a conclusive adjudication, the estoppel so far as that right, title or issue is concerned must likewise extend to every matter which was or might have been urged to sustain or defeat the determination actually made.' (Freeman on Judgments, 5th ed., sec. 677, p. 1432.) * * *

"This principle also operates to demand of a defendant that all his defenses to the cause of action urged by the plaintiff be asserted under the penalty of forever losing the right to thereafter so urge them. The rule has been stated as follows: 'The defendant in an action is ordinarily required to set up all his defenses which do not constitute separate causes of action, and if he neglects to do so is concluded by the judgment rendered in such action. The judgment operates as res judicata, not only in regard to the existence of the plaintiff's cause of action, *but as to the nonexistence of the defense which was not pleaded. The reason for this rule lies in the principle that there must be an end to litigation, and, where a party has an opportunity to present his defense and neglects to do so, the demands of the law require that he should take the consequences.*' (15 Ruling Case Law, sec. 446, pp. 969, 970.)"

In *Sutphin v. Speik,* 15 Cal. (2d) 195, 99 P. (2d) 652, the first action was an action by the plaintiff as

the assignee of an oil royalty to recover the royalties he claimed to be due him. In this action the trial court found that the plaintiff by virtue of his assignment was entitled to the royalty claimed by him on all the oil produced from wells on the real property which was the subject of the oil lease. The second action was an action by the plaintiff to recover royalties which had accrued after the judgment in the first action. In the second action defendant claimed for the first time that the wells on the property were not producing from any oil sand deposit beneath it, but that the wells were producing from a sand in state property under the ocean a considerable distance from the property subject to the lease, and that the defendant was actually paying a royalty to the state on the oil so produced. The court held that the defendant could have contended in the first action that the wells were producing from sands not under the property, and that therefore the judgment in the first action was *res judicata* against him. The court said (15 Cal. (2d) 195, 201-202, 101 P. (2d) 652, 655-656):

> "First, where the causes of action and the parties are the same, a prior judgment is a complete bar in the second action. This is fundamental and is everywhere conceded.
>
> "Second, where the causes of action are different, but the parties are the same, the doctrine applies so as to render conclusive matters which were decided by the first judgment. As this court said in Todhunter v. Smith, 219 Cal. 690, 695 (28 Pac. (2d) 916): 'A prior judgment operates as a bar against a second action upon the same cause, but in a later action upon a different claim or

cause of action, it operates as an estoppel or conclusive adjudication as to such issues in the second action as were actually litigated and determined in the first action.' In the instant case, for example, *the severable installments of royalties due gave rise to separate causes of action;* but a determination of a particular issue in the prior action is res judicata in the second action. (See also, Pratt v. Vaughn, 2 Cal. App. (2d) 722 (38 Pac. (2d) 799).)

"Next is the question, under what circumstances is a matter to be deemed decided by the prior judgment? Obviously, if it is actually raised by proper pleadings and treated as an issue in the cause, it is conclusively determined by the first judgment. But the rule goes further. If the matter was within the scope of the action, related to the subject-matter and relevant to the issues, *so that it could have been raised,* the judgment is conclusive on it despite the fact that it was not in fact expressly pleaded or otherwise urged. The reason for this is manifest. A party cannot by negligence or design withhold issues and litigate them in consecutive actions. *Hence the rule is that the prior judgment is res judicata on matters which were raised or could have been raised, on matters litigated or litigable.* In Price v. Sixth District, 201 Cal. 502, 511 (258 Pac. 387), this court said: 'But an issue may not be thus split into pieces. If it has been determined in a former action, it is binding notwithstanding the parties litigant may have omitted to urge for or against it matters which, if urged, would have produced an opposite result. * * *"